92-1666

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
MAR 30 1993
OFFICE OF THE CLERK

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DAVID LEWIS BUSH
PETITIONER,

VS.

THE BOARD OF SCHOOL
COMMISSIONERS OF MOBILE
COUNTY, ALABAMA, et al.,

RESPONDENT.

==========

APPEAL FROM:

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO.: 92-6162

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
CASE NO. 90-0183 RV-M

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Trial Court committed reversible error in granting Summary Judgment in favor of the Defendants over Plaintiff's claim that his Fourth and Fourteenth Amendment Rights were violated as a result of his arrest and involuntary civil commitment?

PARTIES

PETITIONER

David Lewis Bush

RESPONDENTS

The Board of School Commissioners of Mobile County, Alabama

Robert W. Gilliard, Norman G. Cox, Judy A. McCain, Charles S. Belk, Howard F. Mathis III, Individually and as members of the Board of School Commissioners of Mobile County, Billy D. Salter, individually and as Superintendent and Secretary of the Board of School Commissioners of Mobile County, Alabama.

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PETITION FOR WRIT OF CERTIORARI TO THE U.S. ELEVENTH CIRCUIT COURT OF APPEALS

==========

The Petitioner, David Lewis Bush, respectfully prays that a writ of certiorari issue to review the judgment of the U.S. Eleventh Circuit Court of Appeals entered on December 30, 1992.

OPINIONS BELOW

The U.S. Eleventh Circuit Court of

Appeals entered its decision on December 30, 1992 denying Petitioner's Appeal appealing the February 12, 1992 Summary Judgment entered against the Petitioner by the U.S. District Court for the Southern District of Alabama. A copy of the decisions are printed in Appendixes A and B.

JURISDICTION

On December 30, 1992, the U.S. Eleventh Circuit Court of Appeals, entered its decision affirming the denial of Petitioner's Appeal to set aside the Summary Judgment entered against the Petitioner on February 12, 1992 by the U.S. District Court for the Southern District of Alabama. (Appendixes A and B). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). No other petitioner is

involved in this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV, Petitioner's right to be free from an unlawful arrest and seizure, Amendment XIV, Petitioner's right to the equal protection of the law and the right to due process.

STATEMENT OF THE CASE

March 5, 1990, Petitioner filed the present action against the named Respondents. February 12, 1992, the Trial Court granted summary judgment in favor of the Respondents. On February 21, 1992, Petitioner filed a Notice of Appeal to the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. 1291. On December 30, 1992, the U.S. Eleventh Circuit Court of Appeals affirmed the decision of the Trial Court. On March 30, 1993, Petitioner filed this

writ of certiorari in the U.S. Supreme Court.

REASONS FOR GRANTING THE WRIT

THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION GUARANTEES EVERY CITIZEN THE RIGHT TO BE FREE FROM AN UNLAWFUL SEIZURE/ARREST, AND THE FOURTEENTH AMENDMENT GUARANTEES EVERY CITIZEN THE RIGHT NOT TO BE DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS AND GUARANTEES THE EQUAL PROTECTION OF THE LAW.

STATEMENT OF THE FACTS

Plaintiff, David Bush, is a tenured instructor at Murphy High School, Mobile, Alabama, and was so employed there at all relevant times pertaining to this action.

At all relevant times, Billy Salter was the Superintendent of the Mobile County Public Schools and Secretary of the Board of School Commissioners of Mobile County. Billy Salter was hired by the Mobile County School Board and was responsible for the daily operation of the

schools. (R1-60, Deposition of Billy Salter, p. 36).

On March 4, 1988, Billy Salter, acting within the line and scope of his capacity as Superintendent of the Mobile County Public Schools, executed a Petition to Commit which was filed in the Probate Court of Mobile County, Alabama, with Billy Salter as Petitioner and David Bush as the subject of the Petition. In addressing the question as to his intent for filing the Petition, Billy Salter stated, "The intent was to, number one, get an individual that appeared to need help some help and at the same time protect the young people and other professionals in our system." (R1-60, Deposition of Billy Salter, p. 35). Prior to filing the Petition, he conferred with his attorney, Connie Aune, Paul Sousa, Dr. Robert Gilliard, President of the Mobile

County School Board, Ed McFadden, internal investigator, and Bob Ensley, crisis specialist with the United States Department of Justice in Atlanta, Georgia, (R1-60, Deposition of Billy Salter, pps. 10, 12, 13, 38). When asked whether he had talked to other School Board Members other than Dr. Gilliard prior to signing the Petition, he stated, "...Possibly, but I can't specifically recall. But generally speaking something like this is talked about unofficially or officially." (R1-60, Deposition of Billy Salter, pps. 14-15).

The Petition alleges that David Lewis Bush is "mentally ill and as a consequence thereof poses a real and present threat of substantial harm to self or others; that said danger to self or others has been evidenced by a recent overt act committed by said person as follows:

... 1. David Bush told Alphonse Gordon that Paul Sousa and Joe Smith were responsible for the problems he was having and that he was going to hire a hit man for $500 and have Mr. Sousa and Mr. Smith "bumped off."

... 2. Mr. Bush phoned OCR (Office of Civil Rights) investigator, Juliette Stroman that he was going to kill people in the central office (Barton Academy) of the Mobile County School Board.

... 3. Mr. Bush had previously accused Mr. Rovers, ROTC Instructor at Murphy High School, of allowing students to vandalize his vehicle. Rovers was standing in the parking lot; Mr. Bush veered his vehicle toward Rovers, Rovers had to step out the way to keep from being hit. Bush still came within a few inches of hitting Rovers.

... 4. Mr. Bush made a series of phone calls to Bob Ensley. Mr. Bush was weeping, and said he was going to kill Paul Sousa and Joe Smith, that Sousa is having him followed by UPS trucks and Wells Fargo trucks..."

Petitioner further prayed that "the Court will order the Sheriff of Mobile County to take into custody David Lewis Bush; that a probable cause hearing be held to

determine if said person should be confined pending a final hearing on the merits;..." (R1-1, Petition To Commit).

Pursuant to said Petition, Probate Judge Lionel Noonan issued a "Writ for Body" on March 4, 1988, directing officials with the Mobile County Sheriff's Department to arrest Bush. Bush was arrested at Murphy High School by Sheriff's Department officials on March 7, 1988, and was taken directly to Judge Noonan's chambers. (R1-56, Deposition of David L. Bush, p. 79). After a brief meeting with Bush, during which Bush was presented with and given an opportunity to review the Petition to Commit, Judge Noonan informed Bush that he was going to have Bush transported to the University of South Alabama Medical Center for evaluation. (R1-56, Deposition of David L. Bush, pps. 96-97). Bush thereafter was

taken by Sheriff's Department officials to the Medical Center, where he was held until March 10, 1988. (R1-56, Deposition of David L. Bush, pps. 84, 90-91; (R1-60, Commitment Hearing Transcript).

At the commitment hearing, Alphonse Gordon testified that while David Bush was extremely uptight, he told him ..."There's a possibility he said that he could get people eliminated that kept bothering him." ..." He said there's a possibility that five hundred dollars could be given to somebody to do -- such a thing." (R1-60, Commitment Hearing Transcript, pps. 9-10). Gordon further testified that David Bush never used the phrase "bumped off," (R1-60, Commitment Hearing Transcript, p. 12), never said he was going to hire a hit man, but stated it was a possibility. (R1-60, Commitment Hearing Transcript, p. 13), and David Bush never

told him he was going to hire a hit man to have Paul Sousa and Joe Smith bumped off." (R1-60, Commitment Hearing Transcript, pps. 16-17).

Juliette Stroman testified at the Commitment Hearing that David Bush, frustrated by the fact the Office of Civil Rights could not help him, by way of a telephone conversation, told her "...well, I guess you are just forcing me to take matters into my own hands. I guess I'll just have to get a gun and blow some brains out." (R1-60, Commitment Hearing Transcript, p. 29), but, contrary to the Petition, David Bush never told her he was going around to the central office of Barton Academy at the Mobile County School Board to kill some people. (R1-60, Commitment Hearing Transcript, p. 33).

Ross Rovers testified at the Commitment Hearing that

in September, 1987, while he was standing near the entry of the school's parking lot at Murphy High School, David Bush entered the parking lot that morning and veered his car towards him which caused him to jump out the way.
(R1-60, Commitment Hearing Transcript, pps. 35, 38). He reported the isolated incident to the principal, but never discussed the incident with David Bush. (R1-60, Commitment Hearing Transcript, p. 47).

Robert (Bob) Ensley did not testify at the Commitment Hearing.

After considering the evidence in the case, the Court held that no probable cause to commit the Plaintiff existed. (R1-60, Commitment Hearing Transcript, p. 58).

Paul Sousa stated he has always had a good relationship with David Bush, that

they have never had a cross word, and that David Bush never voiced a threat to him. (R1-60, Deposition of Paul Sousa, pps. 24-26).

David Bush stated that prior to his involuntary commitment pursuant to the Petition of Mobile County School Superintendent Billy Salter, he had never had any psychiatric treatment. Further, Plaintiff states he never made any threats to Paul Sousa, Joseph Smith, Ross Rover, or to any other school official, and has never harmed or attempted to harm any of the said individuals. Prior to Plaintiff's involuntary commitment, he was never approached or apprised by any school officials as to any problems they felt he may have been experiencing at the time, or as to any other matter that culminated in his commitment. (R1-60, Affidavit of David L. Bush). After being involuntarily

committed to the psychiatric floor of the University of South Alabama Medical Center, Plaintiff suffered what he believe to have been a heart attack, and was treated for it. (R1-60, Affidavit of David Bush).

Robert Ensley, a crisis specialist with the United States Department of Justice in Atlanta, Georgia, stated that David Bush told him that if his children were injured as a result of any of this, not specifying what, that he was going to get a gun and go and kill Mr. Sousa. According to Robert Ensley, David Bush always conditioned his alleged threat upon his children being injured. (R1-60, Deposition of Robert Ensley, pps. 43, 51-52). Paul Sousa informed Robert Ensley that David Bush was one of the finest teachers at the school, and it was difficult for him to believe his life was

in danger. Further, Ensley stated Sousa was not afraid of David Bush, and he knew of no overt act undertaken by Bush to carry out the alleged threat. Ensley indicated he had never called the police concerning Bush's alleged threats, and Bush never showed him any type of weapon. (R1-60, Deposition of Robert Ensley, pps. 26, 45, 46, 50).

After considering all the evidence presented at the Commitment Hearing, the Probate Judge dismissed the Petition to Commit without prejudice.

ARGUMENT

Because of his involuntary commitment, inter alia, Petitioner David Bush filed a claim against the Respondents pursuant to the Fourth and Fourteenth Amendments to the United States Constitution to redress damages resulting from his asserted unlawful search and

seizure of his person, and brought a claim pursuant to 42 U.S.C. Section 1983 to redress damages resulting from the asserted violation of his rights as protected by the Fourth and Fourteenth Amendments.

Code of Alabama Sections 22-52-1 et seq. establish procedures for the involuntary commitment of individuals who are mentally ill and, as a consequence of such mental illness pose a real and present threat of substantial harm to themselves or to others. Upon receiving a petition to commit, a Probate Judge must immediately review the petition to determine whether it is "totally without merit" and should be "dismissed without further proceedings." Alabama Code Section 22-52-2(b). In making such a determination, the Probate Judge may require the petitioner "to be sworn and

answer under oath questions regarding the petition and the person sought to be committed." Ala. Code Section 22-52-2(a). A petition to commit may request that limitations be placed upon the liberty of the prospective committee pending the outcome of a final hearing on the merits of the petition.

Pursuant to Franks v. Delaware, 438 U.S. 154, 57 L.Ed.2d 667 (1978), a party challenging an arrest warrant has the burden of making a substantial showing that (1) the affiant knowingly and intentionally, or with reckless disregard for the truth, included false statements in the affidavit, and (2) that the false statements were necessary to the finding of probable cause.

Petitioner asserts that the Petition to Commit which was filed by Defendant Billy Salter to have Petitioner David Bush

committed, contained false statements that were either knowingly and intentionally made by Billy Salter, or the false statements were made with a reckless disregard for the truth, further, the false statements were necessary to the finding of probable cause for Petitioner's arrest.

The Petition alleges that David Lewis Bush is "mentally ill and as a consequence thereof poses a real and present threat of substantial harm to self or others; that said danger to self or others has been evidenced by a recent overt act committed by said person as follows:

... 1. David Bush told Alphonse Gordon that Paul Sousa and Joe Smith were responsible for the problems he was having and that he was going to hire a hit man for $500 and have Mr. Sousa and Mr. Smith "bumped off."

... 2. Mr. Bush phoned OCR (Office of Civil Rights) investigator, Juliette Stroman that he was going to kill people in the

central office (Barton Academy) of the Mobile County School Board.

... 3. Mr. Bush had previously accused Mr. Rovers, ROTC Instructor at Murphy High School, of allowing students to vandalize his vehicle. Rovers was standing in the parking lot; Mr. Bush veered his vehicle toward Rovers, Rovers had to step out the way to keep from being hit. Bush still came within a few inches of hitting Rovers.

... 4. Mr. Bush made a series of phone calls to Bob Ensley. Mr. Bush was weeping, and said he was going to kill Paul Sousa and Joe Smith, that Sousa is having him followed by UPS trucks and Wells Fargo trucks..."

Petitioner further prayed that "the Court will order the Sheriff of Mobile County to take into custody David Lewis Bush; that a probable cause hearing be held to determine if said person should be confined pending a final hearing on the merits;..."

At the commitment hearing, Alphonse Gordon testified that while David Bush was extremely uptight, he told him ..."There's

a possibility he said that he could get people eliminated that kept bothering him." ..." He said there's a possibility that five hundred dollars could be given to somebody to do -- such a thing." (R1-60, Commitment Hearing Transcript, pps. 9-10). Gordon further testified that David Bush never used the phrase "bumped off," (R1-60, Commitment Hearing Transcript, p. 12), never said he was going to hire a hit man, but stated it was a possibility, (R1-60, Commitment Hearing Transcript, p. 13), and David Bush never told him he was going to hire a hit man to have Paul Sousa and Joe Smith bumped off." (R1-60, Commitment Hearing Transcript, pps. 16-17).

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telephone conversation, told her "...well, I guess you are just forcing me to take matters into my own hands. I guess I'll just have to get a gun and blow some brains out." (R1-60, Commitment Hearing Transcript, p. 29), but, contrary to the Petition, David Bush never told her he was going around to the central office of Barton Academy at the Mobile County School Board to kill some people. (R1-60, Commitment Hearing Transcript, p. 33).

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Robert Ensley, a crisis specialist with the United States Department of Justice in Atlanta, Georgia, stated that

David Bush told him that if his children were injured as a result of any of this, not specifying what, that he was going to get a gun and go and kill Mr. Sousa. According to Robert Ensley, David Bush always conditioned his alleged threat upon his children being injured. (R1-60, Deposition of Robert Ensley, pps. 43, 51-52). Paul Sousa informed Robert Ensley that David Bush was one of the finest teachers at the school, and it was difficult for him to believe his life was in danger. Further, Ensley stated Sousa was not afraid of David Bush, and he knew of no overt act undertaken by Bush to carry out the alleged threat. Ensley indicated he had never called the police concerning Bush's alleged threats, and Bush never showed him any type of weapon. (R1-60, Deposition of Robert Ensley, pps. 26, 45, 46, 50).

After considering the evidence in the case, the Court held that no probable cause to commit the Petitioner existed. (Commitment Hearing Transcript, p. 58). If the Petition to Commit had contained the correct statements as were testified to at the commitment hearing, it is more than reasonable to assume a warrant for Petitioner's arrest never would have been issued.

Prior to filing the Petition to Commit, Billy Salter and Paul Sousa, Billy Salter's Executive, discussed David Bush's case and surrounding circumstances with the Mobile Police and with the Mobile District Attorney Chris Galanos. (Deposition of Paul Sousa, pps. 16-17). From searching the Court records, no arrest warrant or criminal complaint resulted from said meetings with the police and District Attorney Galanos. It

is more than reasonable to assume that the police and District Attorney Galanos informed Billy Salter and Paul Sousa that there existed a lack of probable cause for Petitioner's arrest. In spite of having previously discussed Petitioner's case with the police and District Attorney Galanos, and in spite of the fact neither the police or District Attorney Galanos sought to arrest or question David Bush, Billy Salter still filed the Petition to Commit David Bush. Billy Salter failed to apprise the Probate Judge of the foregoing facts.

It was Billy Salter's Petition to Commit, and the statements contained therein, that directly and proximately caused Petitioner to be arrested.

Considering the foregoing, there exists a genuine issue for trial as to whether Petitioner's Fourth and Fourteenth

Amendment Rights against an unlawful search and seizure were violated under color of law by the Respondents.

Further, as enunciated by Code of Alabama Section 22-55-10:

> "(a) If at the final hearing upon a petition seeking to commit a person to the custody of the state department of mental health and mental retardation or such other public facility as the court may order, the probate judge, on the basis of clear, unequivocal and convincing evidence, shall find:
> (1) That the person sought to be committed is mentally ill; and
> (2) That as a consequence of the mental illness the person poses a real and present threat of substantial harm to himself or to others; and
> (3) That the threat of substantial harm has been evidenced by a recent overt act; and
> (4) That treatment is available for the person's mental illness or that confinement is necessary to prevent the person from causing substantial harm to himself or to others; and
> (5) That commitment is the least restrictive alternative necessary and available for treatment of the person's mental

illness...
(b) If any such element be unproved, the probate judge shall deny the petition and discharge the subject of the petition sine die..."

In addressing the issue of danger, Lynch v. Baxley, 386 F.Supp. 378 (Ala. 1974), the Court states:

"...The danger posed by the person to be committed has been evidenced by a recent overt act. Due process requires that the need for confinement be based upon a substantial likelihood that dangerous behavior will be engaged in unless restraints are applied. While the actual assessment of the likelihood of danger calls for an exercise of medical judgment, the sufficiency of the evidence to support such a determination is fundamentally a legal question. A mere expectancy that danger-productive behavior might be engaged in does not rise to the level of legal significance when the consequence of such an evaluation is involuntary confinement. To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another." at 391.

In the instant case, Billy Salter's Involuntary Commitment Petition was predicated on Petitioner's alleged threat to commit future violent acts. To have confined Petitioner against his will because he was considered likely to be dangerous in the future, it must have been shown that he had actually been dangerous in the recent past, and that the future danger he posed had been manifested by an overt act, attempt or threat to do substantial harm to himself or to another. Lynch v. Baxley, supra. The facts as previously set forth do not show clearly, unequivocally and convincingly that Petitioner ever committed a dangerous act just recent to his involuntary commitment. However, Billy Salter still filed the Involuntary Commitment Petition.

The probate judge must deny a Commitment Petition if any of the

foregoing elements are not proven by clear, unequivocal and convincing evidence. Riley v. State, 550 So.2d 1037 (Ala.Civ.App. 1989); Code of Alabama Section 22-55-10. Not only is the danger element deficient, the facts do not prove clearly, unequivocally and convincingly any of the required elements for involuntary commitment. Accordingly, the Involuntary Commitment Petition was properly denied, and Billy Salter should have known when he filed it that it was going to be denied.

Under Alabama law, a master is responsible for his servant's acts within the scope of his authority. Moman v. Gregerson's Foods, Inc., 570 So.2d 1215 (Ala. 1990); Lawler Mobile Homes, Inc. v. Tarver, 492 So.2d 297 (Ala. 1986). Under the doctrine of respondeat superior, if an agent's act was incident to carrying out

the duties assigned to him by his master, the master may be held liable, even though he did not authorize the agent's means, and also though the agent may have sought to accomplish the master's business in a manner contrary to the master's express instructions. Wood v. Holiday Inns, Inc., 508 F.2d 167 (5th Cir. 1975).

At all relevant times, Billy Salter was the Superintendent of the Mobile County Public Schools and Secretary of the Board of School Commissioners of Mobile County. Billy Salter was hired by the Mobile County School Board and was responsible for the daily operation of the schools. (R1-60, Deposition of Billy Salter, p. 36).

On March 4, 1988, Billy Salter, acting within the line and scope of his capacity as Superintendent of the Mobile County Public Schools, executed a Petition

to Commit which was filed in the Probate Court of Mobile County, Alabama, with Billy Salter as Petitioner and David Bush as the subject of the Petition. Accordingly, the Mobile County School Board is liable for the damages caused to the Petitioner as a result of the Petition filed against him by Billy Salter under the doctrine of respondeat superior. Moman v. Gregerson's Foods, Inc., supra; Lawler Mobile Homes, Inc. v. Tarver, supra; Wood v. Holiday Inns, Inc., supra.

In viewing a motion for summary judgment, the evidence and all factual inferences must be viewed in the light most favorable to the nonmovant. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Thrasher v. State Farm Fire & Casualty Co., 734 F.2d 637 (11th Cir. 1984); Rule 56, Federal Rules of Civil Procedure. The burden of

proof upon a petition for involuntary commitment is heavy and is understood to be higher than has been required for constitutional due process purposes. Riley v. State, 550 So.2d 1037 (Ala.Civ.App. 1989). Alabama's Involuntary Commitment Statute requires clear, unequivocal and convincing evidence as to every element as set forth under the Statute. The elements as set forth in the Statute insures that an individual's right to be free from an unwarranted deprivation of his freedom is not violated. Billy Salter relied on second and third hand information without personally attempting to verify any of it. He never spoke with Petitioner or his family.

Petitioner David L. Bush asserts that Billy Salter's blatant inaccurate statements to the Probate Judge proximately and directly caused him to be

involuntarily committed. Salter created a sense of urgency by making such inaccurate statements as Petitioner had stated that he was going to kill people in the central office (Barton Academy) of the Mobile County School Board; that he was going to hire a hit man for $500.00 and have Mr. Sousa and Mr. Smith bumped off, and that he was going to kill Paul Sousa and Joe Smith, all of which said statements as previously set forth were untrue. Petitioner avers that a jury could reasonably draw an inference from the facts that Billy Salter knowingly and intentionally, or with reckless disregard for the truth, included false statements in the commitment petition affidavit, and that the false statements were necessary to the finding of probable cause for Petitioner's involuntary commitment. Franks v. Delaware, supra.

It is not the function of the Trial Court to resolve genuine factual issues on a summary judgment motion in a jury case. For purposes of a summary judgment motion, the non-movant's version of the facts must be accepted, and all disputed matters must be resolved in his favor. United States v. Diebold, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). The Trial Court resolved genuine factual issues in favor of the Respondents and failed to accept Petitioner's version of the disputed facts.

Summary Judgment is improper when the Court merely believes it is unlikely that opposing party will prevail at trial. Cather v. Catheter Technology Corp., 753 F.Supp 634 (S.D. Miss. 1991). A case is not suitable for summary judgment when there are undisputed facts from which different inferences might be drawn and as

to which reasonable minds might differ. Summary Judgment may be inappropriate, even though basic facts are undisputed, if the ultimate facts in question are to be inferred from them, and the parties disagree regarding the permissible inferences that can be drawn from the basic facts. Where a jury is called for, litigants are entitled to have the jury choose between conflicting inferences from basic facts. Alabama Farm Bureau Mut. Cas. Co., Inc. v. American Fidelity Life Ins. Co., 606 F.2d 602 (5th Cir. 1979); Rehearing denied 610 F.2d 818, certiorari denied 101 S.Ct. 77, 449 U.S. 820, 66 L.Ed.2d 22. In the instant action, the Trial Court granted summary judgment in favor of the Respondents in spite of the fact that there are disputed and undisputed facts from which a jury may reasonably infer that Petitioner is

entitled to a judgment, and accordingly, improperly deprived the jury of resolving the conflicting inferences from the basic facts.

CONCLUSION

Considering the foregoing, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the U.S. Eleventh Circuit Court of Appeals.

Respectfully submitted,

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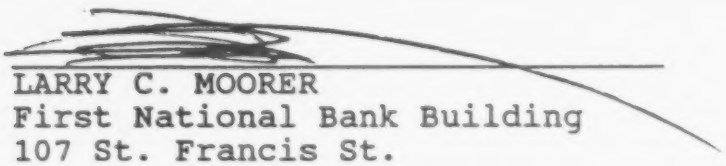
CERTIFICATE OF SERVICE

I hereby certify that I have on this the 30th day of March, 1993, served a copy of the foregoing Petition for Writ of Certiorari upon the Hon. Robert Campbell and Hon. William E. Pipkin, Jr., Attorneys for Respondents, 3763 Professional Parkway, Mobile, AL 36609 by U.S. Mail, postage prepaid.



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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6162
Non-Argument Calendar

D. C. Docket No. 90-0183-RV-M

DAVID LEWIS BUSH,

Plaintiff-Appellant,

versus

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ROBERT W. GILLIARD, NORMAN G. COX, JUDY A. McCAIN, CHARLES S. BELK, HOWARD F. MATHIS, III, BILLY D. SALTER,

Defendants-Appellees.

Appeal from the
United States District Court
for the Southern District
of Alabama

(December 30, 1992)

Before KRAVITCH and BIRCH, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

APPENDIX "A"

In this case United States District Judge Richard W. Vollmer, Jr., on February 12, 1992, entered a judgment "in favor of the defendants and against the plaintiff." The record reflects that the district judge was correct. We AFFIRM that judgment.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DAVID LEWIS BUSH,

Plaintiff,

V.

CIVIL ACTION NO.
90-0183-RV

THE BOARD OF SCHOOL
COMMISSIONERS OF MOBILE
COUNTY, ALABAMA, et al.,

JUDGMENT

In accordance with the court's Findings of Fact and Conclusions of Law, issued on this same date, February 12, 1992, pursuant to the defendants' original and amended motions for summary judgment, the court concludes that **JUDGMENT** is due to be, and hereby is, **ENTERED** in favor of the defendants, and against the plaintiff, on plaintiff's federal (fourth amendment and 42 U.S.C. Section 1983) claims. With respect to plaintiff's remaining claims,

all of which arise under state common law, the court concludes that those claims are due to be, and hereby are, **DISMISSED** for lack of an independent basis of federal jurisdiction.

All court costs are hereby taxed against the plaintiff.

DONE this the 12th day of February, 1992.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
ALABAMA SOUTHERN DIVISION

DAVID LEWIS BUSH,

Plaintiff,

V.

CIVIL ACTION NO.
90-0183-RV-M

BOARD OF SCHOOL
COMMISSIONERS, et al.,

Defendants.

ORDER

This matter is before the court on the original and amended motions for summary judgment, filed by defendants the Board of School Commissioners of Mobile County, Robert W. Gilliard, Norman G. Cox, Judy A. McCain, Charles S. Belk, Howard F. Mathis, III, and Billy D. Salter (tabs 55 and 66), and all materials submitted in support thereof (tabs 56, 57, and 67), and on plaintiff's original and amended responses to defendants' original and amended motions for summary judgment

(tabs 60 and 69). After due and proper consideration of the foregoing, the court hereby issues the following Findings of Fact and Conclusions of Law.

Facts

1. The plaintiff herein, David Lewis Bush ("Bush"), is, and at all times material to this action was, a tenured teacher with the Mobile County Public Schools ("Public Schools") assigned to Murphy High School. (See Pretrial Order dated July 16, 1991 ["Pretrial Order"], Statement of Undisputed Facts, ¶1; Statement of Case, ¶1.)

2. The defendants are the Board of School Commissioners of Mobile County ("School Board"), which administers the Public Schools; Robert W. Gilliard ("Gilliard"), Norman G. Cox, Judy McCain, Charles S. Belk, and Howard F. Mathis,

III, who are sued individually and in their capacity as members of the School Board; and Billy D. Salter ("Salter"), who is sued individually and in his former capacity as Superintendent of the Public Schools and Secretary of the School Board. (See Pretrial Order, Statement of Undisputed Facts, ¶¶1, 2, and 3.)

3. On or about November 3, 1987, plaintiff filed a complaint of racial discrimination and retaliation with the United States Department of Education in Atlanta, Georgia (the "Department of Education"), against his employer, the Public Schools. In said complaint, plaintiff made a specific accusation of discrimination against Paul Sousa ("Sousa"), who, at that time, was the principal of Murphy High School. (See

Exhibit A to defendants' original motion for summary judgment.)

4. On February 19, 1988, Alice Henry ("Henry"), an investigator with the Department of Education, telephoned Bush for the purpose of informing him that no violations had been found by the Department with regard to his complaint. (See Exhibit B to defendants' original motion for summary judgment; see also Pretrial Order, Statement of Undisputed Facts, ¶ 8.) In a "record of contact" executed by Henry following the conversation, Henry indicated that Bush made accusations against Sousa during the conversation and threatened "to hurt someone" and "take action himself." (See Exhibit B to defendants' original motion for summary judgment.)

5. A written denial of Bush's complaint

was issued by the Department of Education on February 26, 1988. (See Exhibit F to defendants' original motion for summary judgment.) On March 3, 1988, after receiving said written denial, Bush contacted Juliette Stroman ("Stroman"), with the Department of Education's Office of Civil Rights in Atlanta, to discuss the Department's denial of his complaint. A "record of contact" executed by Stroman following the conversation indicates that Bush stated during the conversation that the Department's decision left him with no choice but to "take matters into his own hands," and that he was going to "get a gun and blow some brains out." (See Exhibit I to defendants' original motion for summary judgment.)

6. Contemporaneous with the Department of Education's investigation and denial of

Bush's complaint, Public School officials received information from various "identified independent sources," which gave rise to "a concern that [Bush] posed a potential danger to students and school officials." (See Pretrial Order, Statement of Undisputed Facts, ¶9; Sousa Depo., at 8-9.) Sousa received direct verbal reports of problems with Bush from Alphonse Gordon ("Gordon"), a retired Murphy High School teacher and long-time friend of Bush (Sousa Depo., at 9, 10-13; but see Commitment Transcript, at R-12); Joe Smith, who then was Assistant Principal of Murphy High School (Sousa Depo., at 9, 13-14); Ross Rover ("Rover"), ROTC Instructor at Murphy High School (Sousa Depo., at 9, 15); and Richard Robert Ensley ("Ensley"), who at that time was a Crisis Specialist with the Department of Justice in Atlanta (Sousa Depo., at 10,20).

Sousa thought that someone close to Bush should talk to him (Sousa Depo., at 9), but Gordon, who professed to be "like a father to Bush," reported to Sousa that his attempts to talk to Bush had failed. (Sousa Depo., at 20). Ensley, in fact, met with Bush and his wife personally on a at least one occasion, but his consultation with them did not appear to alleviate Bush's apparent problems. (Ensley Depo., at 22-24).

7. Ensley met with Sousa in February

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[1] Bush had obtained Ensley's telephone number from investigators with the Department of Education's Office of Civil Rights. Those investigators encouraged Bush to contact Ensley and inform him of Bush's complaints concerning the Public Schools. (Bush Depo., at 52). During their initial telephone conversations, Bush told Ensley about the facts providing the basis for Bush's racial discrimination complaint against the Public Schools. (Bush Depo., at 56).

1988, to discuss the substance of numerous recent telephone conversations that Ensley had had with Bush.[1] During those conversations, Bush accused Sousa of, inter alia, having the F.B.I. and the Ku Klux Klan follow him. (See Exhibit C to defendants' original motion for summary judgment, February 4, 1988, memorandum from Sousa to McFadden.) Ensley's deposition testimony generally corroborates Sousa's rendition of that meeting and recounts the contents of subsequent conversations Ensley had with Sousa regarding Bush. (See Ensley Depo., at 31.)

8. Ensley testified in deposition that, during his numerous conversations with Bush, which occurred between the Fall 1987, and Spring 1988, Bush stated that "he was under . . . constant surveillance by employees of the Wells Fargo . . . and UPS, ...

[H]e continuously blamed Mr. Paul Sousa." (Ensley Depo., at 15.) Also, according to Ensley, Bush threatened that "if his children were injured as a result of any of this, . . . he was going to get a gun and go kill Mr. Sousa." (Ensley Depo., at 16). Although Bush admits having had repeated conversations with Ensley, he denies that he made any threats, conditional or otherwise, against Sousa and denies having told Ensley that Sousa was having Bush followed by UPS trucks, Wells Fargo trucks, or the Ku Klux Klan. (Bush Depo., at 61-62, 76).

9. Information obtained from Ensley prompted Sousa to order an investigation into other reports of unusual behavior that Sousa had received about Bush. (See Exhibit C to defendant's original motion for summary judgment, February 4,

1988, memorandum from Sousa to McFadden.)

The investigation culminated in the preparation of a written report by Private Investigator William Duffy to Edward McFadden, Internal Program Auditor for the Public Schools. (See Exhibit D to defendant's original motion for summary judgment, February 8, 1988, memorandum from Duffy to McFadden.)

McFadden sent copies of memoranda generated in the course of the investigation to Salter. (Salter Depo., at 13-14.)

10. Sousa had no personal knowledge of Bush's alleged erratic behavior. (Sousa Depo., at 26). Nevertheless, he verbally communicated all of the information he received about Bush to Salter (Sousa Depo., at 16), and also consulted with Mobile County District

Attorney Chris Galanos. (Sousa Depo., at 17).

11. On March 4, 1988, Salter, acting within the line and scope of his employment as Superintendent of the Public Schools, executed a petition for the involuntary commitment of Bush. (See Exhibit 1 to the January 8, 1991, Ensley Depo., submitted in support of defendants' original motion for summary judgment; Pretrial Order, Statement of undisputed facts, ¶ 21; Salter Depo., at 9.) The Petition to Commit was executed by Salter and filed with the Probate Court of Mobile County following Salter's consultation with various individuals, including, but not limited to, defendant Gilliard; Ensley; McFadden; Connie Aune, the School Board's in-house counsel; and Sousa. (See Pretrial Order,

Statement of Undisputed Facts, ¶¶10, 11, 12, and 13; see also Salter Depo., at 10, 13, 23-24; Sousa Depo., at 23.) Salter also may have had undocumented official or unofficial conversations with other School Board members prior to executing the Petition to Commit. (Salter Depo., at 14-15.) He did not, however, have the express prior consent of the School Board or of Sousa to file the Petition. (Salter Depo., at 37.)[2]

12. At the time he signed the Petition to Commit, Salter had no personal knowledge

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[2] There is nothing in the record to suggest that Salter or Sousa were aware of the vague threats, referred to herein, supra at paragraph 4, that Bush allegedly communicated to Henry upon learning that the Department of Education had denied his racial discrimination complaint.

of the matters set forth therein. Rather, he had garnered the information "from good reliable people of reliable character," including Aune, Sousa, McFadden and his staff, Gilliard, and Ensley. (Salter Depo., at 17-18, 38.) Salter had never executed a Petition to Commit prior to executing the Petition against Bush. (Salter Depo., at 21).

13. Prior to executing the Petition, Salter and others considered alternatives to filing a commitment petition. (Salter Depo, at 22, 38.) Sousa, in fact, considered meeting with Bush, but was cautioned by others, including Ensley, that a direct confrontation might precipitate drastic, diasterous consequences. (Sousa Depo., at 26-28.)

14. In executing the Petition to Commit, Salter's intent "was to, number one, get an individual that appeared to need help some

help and at the same time protect the young people and other professionals in our system.' (Salter Depo., at 35). Bush, who, in fact, had never met Salter prior to the acts made the basis of this action, has no knowledge or information indicating that Salter lied when filling out the Petition to Commit. (Bush Depo., at 86-87.) Bush conceded that Salter simply may have filled out the Petition with information that, though incorrect, he believed to be correct. (Bush Depo., at 94.)

15. The Petition to Commit alleged the following with respect to Bush:

> David Bush . . . is mentally ill and as a consequence thereof poses a real and present threat of substantial harm to self or others; that said danger to self or others has been evidenced by a recent overt act committed by said person as follows:
>
> 1. . . . November, 1987 . . .: David Bush told Alphonse Gordon that Paul Sousa and Joe Smith were responsible for the problems

he was having and that he was going to hire a hit man for $500 and have Mr. Sousa and Mr. Smith "bumped off."

* * *

2. . . . March, 1988 . . .: Mr. Bush phoned OCR investigator, Juliette Stroman that he was going to kill people in the central office (Barton Academy) of the Mobile County School Board.

* * *

3. . . . September, 1987 . . . : Mr. Bush had previously accused Mr. Rovers, ROTC Instructor at Murphy High School, of allowing students to vandalize his vehicle. Rovers was standing in the parking lot; Mr. Bush veered his vehicle toward Rovers, Rovers had to step out of the way to keep from being hit. Bush still came within a few inches of hitting Rovers.

* * *

4. . . . Feb. and March, 1988 . . . : Mr. Bush made a series of phone calls to Bob Ensley. Mr. Bush was weeping, and said he was going to kill Paul Sousa and Joe Smith, that Sousa is having him following [sic] by UPS trucks and Wells Fargo trucks.

(See Ensley Depo., Exhibit 1.) The petition further requested that Bush immediately be taken into custody and that a probable cause

hearing be held to determine if Bush "should be confined pending a final hearing on the merits." (Id.)

16. Pursuant to said Petition, Probate Judge Lionel Noonan issued a "Writ for Body" on March 4, 1988, directing officials with the Mobile County Sheriff's Department to arrest Bush. Bush was arrested at Murphy High School by Sheriff's Department officials on March 7, 1988, and was taken directly to Judge Noonan's chambers. (Bush Depo., at 79). None of the defendants was present during Bush's arrest. (See Pretrial Order, Statement of Undisputed Facts, ¶19.)

17. After a brief meeting with Bush, during which Bush was presented with and given an opportunity to review the Petition to Commit, Judge Noonan informed Bush that he was going to have Bush transported to the University of South Alabama Medical Center

(the "Medical Center") for evaluation. (Bush Depo., at 96-97.) Bush thereafter was taken by Sheriff's Department officials to the Medical Center, where he was held until March 10, 1988. (Bush Depo., at 84,90-91; Commitment Transcript, submitted in support of plaintiff's original response to defendants' original motion for summary judgment, at R-3.)

18. Prior to being arrested and confined at the Medical Center, Bush was never questioned or consulted by any school officials about any of the matters that culminated in Salter's execution of the Petition to Commit and Bush's subsequent confinement. (Bush Affidavit, submitted in support of plaintiff's amended response to defendants' amended motion for summary judgment.) Moreover, no members of Bush's family were approached or contacted prior

to Bush's arrest and confinement. (Id.)

19. Bush's confinement at the Medical Center was carried out pursuant to a valid order issued by the Probate Court of Mobile County. (See Pretrial Order, Statement of Undisputed Facts, ¶ 20.) Neither the School Board members nor Salter was present during Bush's confinement. (Id.)

20. On March 10, 1988, a hearing was held in the Mobile County Probate Court for the purpose of determining if there was probable cause for Bush's temporary detention. (Commitment Transcript, at R-3.) Testimonial evidence was presented at the hearing by Rovers, Gordon, and Stroman regarding the matters set forth in the Petition to Commit.

21. Specifically, Gordon testified that, although Bush was very uptight and

made general complaints against Sousa and Smith during their November 1987, conversation (Commitment Transcript, at R-7 & 11), Bush did not state that he was going to hire a hit man for $500.00 to "bump off" Sousa and Smith. (Commitment Transcript, at R-10, 12, 16-17.) Instead, according to Gordon, Bush stated that there was a "possibility" that Bush could get the people who were bothering him "eliminated" for $500.00. (Commitment Transcript, at R-9, 10, 13, 17-18.)

22. Stroman testified that, although during their March 3, 1988, telephone conversation Bush did not tell her that he was going to kill some people at the School Board's Barton Academy offices (Id., at R-33), Bush did state that the Department of Education was "just forcing [him] to take matters into [his] own hands" and "[he] guess[ed he'd]

just have to get a gun and blow some brains out." (Commitment Transcript, at R-29, 32-33.

23. Rovers verified that Bush had veered his car towards Rovers in a Murphy High School parking lot in September 1987, leading Rovers to believe that Bush was trying to run him over. (Commitment Transcript, at R-38-39, 43.) Rovers further testified that, although he reported the incident to Sousa, he thereafter did not confront Bush about the incident. (Id., at R-43, 47.)

24. Robert Ensley did not testify at the probable cause hearing.

25. After the presentation of evidence and hearing of arguments by representatives for Salter and Bush, the Probate Judge dismissed the Petition to Commit without prejudice. (Commitment Transcript, at R-58.) In ruling, the Probate Judge stated:

Mr. Wilson [Bush's attorney], the Court doesn't find that the picture is as you've drawn the picture totally, and neither, Mr. Hughes [Salter's attorney], does the Court find that the picture that you would draw from the complaint is substantiated and supported by the testimony.

And as you know, that the Federal case law and the statutes of Alabama require that the proof be clear, convincing, and unequivocal. And the Court feels it has no alternative than to grant the motion to dismiss, but this Court is going to dismiss it without prejudice.

So Mr. Bush, you can leave the court. The Court has dismissed it without prejudice. The Court very . . . humbly believes that you need to talk with your doctor and see a doctor on a regular basis. And there may be something to the allegations as set out in this petition, but the Court has to be just as concerned about your rights as the next person's rights and that the burden of proof is on the petitioner to measure up to that standard required by Lynch versus Baxley, [386 F. Supp. 378, 393 (M.D. Ala. 1974)(clear, convincing, and unequivocal)].

(Commitment Transcript, at R-57-58).

26. Bush denies the specific allegations made against him in numbered paragraphs one,

two, three, and four of the Petition to Commit. (Bush Depo., at 39, 41-42; 49; 51; 61-62, 76.) Bush, moreover, denies that he ever "made any threats to Paul Sousa, Joseph Smith, Ross Rover, or any other school official, and . . . [ever] harmed of [sic] attempted to harm any of the said individuals." (Bush Affidavit.)

27. The instant suit was filed on March 5, 1990. Although plaintiff's claims, as originally filed, have changed through amendments to the pleadings and as a consequence of the court's order following the pretrial hearing, presently six claims for relief are outstanding against each of the defendants identified hereinabove:

(1) a claim brought directly pursuant to the fourth and fourteenth amendments

to the United States Constitution to redress damages resulting from an alleged unlawful search and seizure of the plaintiff;

(2) a claim for invasion of privacy, brought pursuant to Alabama common law;

(3) a claim for malicious prosecution;

(4) a claim based upon the tort of outrage;

(4) a claim for intentional infliction of emotional distress; and

(5) a claim brought pursuant to 42 U.S.C. § 1983 to redress damages resulting from an alleged violation of plaintiff's rights as protected by the fourth and fourteenth amendments to the United States Constitution.[3]

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[3] Claims for abuse of process, false imprisonment/false arrest, and for an alleged violation of 42 U.S.C. Section 1985, previously were dismissed. (See Court's order on pretrial hearing, dated August 6, 1991.) Additionally, the Medical Center and three doctors who allegedly observed and/or treated plaintiff while he was detained at the

28. All of Bush's claims arise out of Salter's execution of the Petition to Commit (See Pretrial Order, Statement of Undisputed facts, ¶22), and are based solely on Bush's contention that the allegations against him contained in the Petition to Commit were false. (Bush Depo., at 85, 89). Bush does not challenge the constitutionality of the involuntary commitment statutes, the validity of his confinement at the Medical Center, or the constitutionality (including the timeliness) of his probable cause hearing. Furthermore, Bush did not name as defendants the Judge of Probate or any of the Sheriff's Department officials who effectuated

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Medical Center were voluntarily dismissed by the plaintiff as defendants to this lawsuit. (See Plaintiff's "Motion to Dismiss," dated July 18, 1991, and the court's order of dismissal, dated July 25, 1991.)

Bush's arrest.

29. Although Bush denies that he made any threats against, or attempts to harm, anyone, he does not argue that the information contained in the Petition to Commit, if true, would be insufficient to establish probable cause for an arrest. Inherent in his federal claims is an assumption that what little of the total information contained in the Petition to Commit may have been substantiated during the Commitment hearing was insufficient to establish probable cause for the execution of the "Writ of Body" and Bush's subsequent seizure.

30. In addition to contending that they are entitled to judgment as a matter of law on all of Bush's claims, defendants maintain that certain of those claims are barred by the applicable statute of limitations and that all acts undertaken by the individual defendants in their official capacities are

protected by the doctrine of qualified immunity. Additionally, the individual members of the School Board maintain that liability cannot lie against them in their individual capacities since there is no evidence in this case to indicate that any one of them personally had anything to do with executing the Petition to Commit.

Discussion

1. The court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and the court's pendant jurisdiction. Venue, moreover, is appropriate in this judicial district pursuant to 28 U.S.C. § 1391

A. Standard of Review

2. In considering a motion for summary judgment, the court must examine the pleadings, depositions, answers to inter-rogatories, and admissions on

file, together with any affidavits, in the light most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Addickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Summary judgment is due to be granted only if the foregoing materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The court may not resolve factual disputes by weighing conflicting evidence. Tippens v. Celotex Corp., 805 F.2d 949, 953 (11th Cir. 1986), reh'g den., 815 F.2d 66 (11th Cir. 1987).

3. The party moving for summary judgment bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact

that precludes summary judgment. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

The non-moving party cannot discharge its burden on summary judgment by relying solely on the bare allegations of the pleadings. In ruling on a motion for summary judgment, the court must conduct a bifurcated inquiry, assessing in the first instance whether the moving party has satisfied its initial burden and, in the second instance, whether the non-moving party successfully has rebutted the moving party's initial showing of no genuine issues of material fact.

B. Bush's Contentions and the Involuntary Commitment Statutes

4. Sections 22-52-1 through -17 of the Alabama Code establish procedures for the involuntary commitment of individuals who are "mentally ill and, as a consequence of such mental illness pose[] a real and

present threat of substantial harm to [themselves] or to others . . . ." Ala. Code § 22-52-1(a).

5. Section 22-52-1, Alabama Code, provides for the execution of a verified petition to commit and filing of said petition with the appropriate Probate Court. That provision dictates the form and substance of the petition.

6. Upon receiving a petition to commit, a Probate Judge immediately must review the petition to determine whether it is "totally without merit" and should be "dismissed without further proceedings." Alabama Code § 22-52-2(b). In making such a determination, the Probate Judge may require the petitioner "to be sworn and answer under oath questions regarding the petition and the person sought to be committed." Ala. Code § 22-52-2(a).

7. A petition to commit may request that limitations be placed upon the liberty of the prospective committee pending the outcome of a final hearing on the merits of the petition. When a petition seeks such interim relief,

> the Probate Judge shall order the sheriff of the county in which such person is located to serve a copy of the petition upon such person and to bring such person before the judge instanter. When any such person against whom a petition has been filed . . . is initially brought before the probate judge, the probate judge shall determine from an interview with the person sought to be committed and with other available persons what limitations, if any, shall be imposed upon such person's liberty and what temporary treatment, if any, shall be imposed upon such person pending further hearings.
>
> No limitations shall be placed upon such person's liberty nor treatment imposed upon such person unless such limitations are necessary to prevent such person from doing substantial and immediate harm to himself or to others or to prevent such person from leaving the jurisdiction of the court.

Ala. Code § 22-52-7(a) & (b).

8. Furthermore, when such interim relief is requested, the prospective committee "has no due process rights to any advance notice prior to being brought before the probate judge." Pope v. Alston, 537 So. 2d 953, 955 (Ala. Civ. App. 1988). To conclude otherwise would defeat the purpose of the involuntary commitment statute. Id.

9. During a § 22-52-7(a) interview between the prospective committee and the Probate Judge, the committee is not entitled to counsel. Id. at 956. In fact, because the interview is authorized only as an emergency procedure, id., detention resulting from said interview is only permitted for the length of time that is required to arrange a probable cause hearing. Id. (citing Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974), rev'd on other grounds, 651 F.2d 387 (5th Cir. 1981)).

10. When and if the Probate Judge determines that a prospective committee should be detained pursuant to Ala. Code § 22-52-7, the Probate Judge must schedule a hearing, to be held within seven (7) days, to determine if there is probable cause for the continued temporary detention and treatment of such person pending a final hearing on the merits. Ala. Code § 22-52-8. If, at such hearing, the probate judge finds that probable cause exists for such temporary detention and finds that temporary treatment would be in the best interest of the prospective committee, then the Probate Judge must enter a written order so stating and setting the date, time, and place for a final hearing on the merits of the petition. Id. A final hearing must be held within thirty (30) days of

the date on which the prospective committee was served with a copy of the petition. Id.

11. A final commitment will not be ordered in the absence of clear, unequivocal and convincing evidence . . .

(1) that the person sought to be committed is mentally ill; and

(2) that as a consequence of the mental illness the person poses a real and present threat of substantial harm to himself or to others; and

(3) that the threat of substantial harm has been evidenced by a recent overt act; and

(4) that treatment is available for the person's mental illness or that confinement is necessary to prevent the person from causing substantial harm to himself or to others; and

(5) that commitment is the least restrictive alternative necessary and available for treatment of the person's mental illness . . . ."

Ala. Code, § 22-52-10.

12. In this case, Salter executed the Petition to Commit Bush, in which he requested that Bush be arrested immediately and that a probable cause hearing be held

forthwith to determine if Bush should be detained pending a final hearing on the merits. Presumably following a statutorily-required, independent review of the Petition to Commit and determination that the Petition was not due to be dismissed forthwith as being "totally without merit, " the Probate Judge ordered Bush's arrest. An interview between the Probate Judge and Bush subsequently was held, pursuant to which the Probate Judge determined that Bush should be detained pending a probable cause hearing. Bush's brief confinement at the Medical Center resulted.

13. Any time after receiving the Petition to Commit, including prior to executing the Writ for Body and during or immediately following his "interview" with Bush, the Probate Judge could have dismissed the Petition as being "totally

without merit." The Probate Judge did not dismiss the Petition, however, until the conclusion of the probable cause hearing. Even then, the Petition was dismissed only after the Probate Judge noted that there was not clear, convincing, unequivocal evidence for Bush's involuntary commitment. The Probate Judge did not indicate at the hearing that probable cause for Bush's arrest and brief prior confinement were lacking. In the undersigned's opinion, in fact, the former determination does not mandate the latter conclusion.

C. **Bush's Claim Under 42 U.S.C. § 1983 and the Fourth Amendment**

14. As noted, Bush has asserted two federal claims against the defendants: one brought pursuant to the fourth and fourteenth amendments, and the other brought pursuant to 42 U.S.C. § 1983 to redress an alleged

violation of his fourth and fourteenth amendment rights.[4] In the court's opinion, the claims, as asserted, are largely redundant, requiring proof of essentially the same elements. Therefore, the court shall not distinguish between the two in its analysis, but, instead, hereinafter shall refer to both as Bush's "fourth amendment claims."

15. With respect to the fourth amendment claims, Bush alleges

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[4] Bush does not state a separate claim for an alleged violation of his fourteenth amendment equal protection rights. Rather, his reference to and reliance on the fourteenth amendment stems solely from the fact that the fourth amendment is made applicable to the states by virtue of the due process clause of the fourteenth amendment. Wolf v. Colorado, 338 U.S. 25, ____ S. Ct. ____, 93 L.Ed. 1782 (1949).

that Billy D. Salter knew or should have known that his evidence to involuntary commit plaintiff was based on mere speculation, and was so deficient that he knew or should have known that there was a lack of probable cause for having plaintiff committed, and that his Petition would unreasonably subject plaintiff to an unwarranted and involuntary deprivation of his freedom.

16. In analyzing Bush's fourth amendment claims, the court chooses not to address on summary judgment the qualified immunity and statute of limitations defenses raised by the defendants, nor shall the court determ as a threshold matter whether a claim of fourth amendment liability appropriately is applied to a case of this type. Instead, the court shall give the plaintiff the full benefit of his allegations by presuming that Bush has not failed to state a claim for relief, that the statute of limitations would not bar Bush's claims, that any proven fourth amendment liability would attach

to Salter, and that Salter and the remaining defendants are not beneficiaries of any immunity.

17. The most expedient and decisive starting point for the court's analysis is an inquiry into what the fourth amendment requires regarding seizures and what is necessary in a case of this type to establish liability on the part of one such as Salter. The bulwark of fourth amendment protection is the Warrant Clause, which requires, absent certain exceptions, that law enforcement officers obtain a warrant from a neutral and disinterested magistrate before executing a search or seizure. In relevant part, the fourth amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation . . . ." The Warrant Clause takes as its premise the good faith of the warrant affiant.

18. Courts only recently have acknowledged, at least in the context of a section 1983 challenge to actions undertaken by law enforcement officers, that liability may be available against one who knowingly and intentionally, or with reckless disregard, included material false statements in a warrant affidavit, which false statements were necessary to a judicial officer's finding of probable cause. See, e.g., Rykers v. Alford, 832 F.2d 895 (5th Cir. 1987); Olson v. Taylor, 825 F.2d 1116, 1118 (7th Cir. 1987); Smith v. Gonzales, 670 F.2d 522, 526 (5th Cir. 1982); Pennington v. Hobson, 719 F. Supp. 760, 767 (S.D. Ind. 1989); Willocks v. Dodenhoff, 110 F.R.D. 652 (D. Conn. 1986). Such "affiant liability" actions seek to

premise liability on the alleged wrongdoer's action in preparing a warrant affidavit.

19. The Supreme Court has not forged a separate civil "standard" or "test," to be applied in section 1983 cases, for assessing "affiant liability." Lower courts considering the issue, however, have borrowed from the Supreme Court's decision in Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), a criminal suppression case involving a challenge to the veracity of a search warrant affidavit, in formulating an appropriate test.

See Olson v. Taylor, 825 F.2d 1116, 1118 (7th Cir. 1987); Willocks v. Dodenhoff, 110 F.R.D. 652 (D. Conn. 1986).[5]

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[5] Relevant case law indicates that constitutional rights should be applied congruently in criminal suppression hearings and section 1983 damage actions. Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L.Ed. 2d 271 (1986).

20. The defendant in Franks claimed as false certain statements made by the warrant affiants, which allegedly were within the affiants' personal knowledge. At a suppression hearing, defense counsel asserted that certain named individuals would testify as to the falsity of the affiants' statements. The state trial court rejected counsel's proffer and ultimately denied defendant's motion to suppress. On appeal, the Delaware Supreme Court affirmed the trial court's decision, concluding "that a defendant under no circumstances may so challenge the veracity of a sworn statement used by police to procure a search warrant." Franks, 438 U.S. at 155, 98 S. Ct. at ___, 57 L. Ed. 2d at 672.

21. The Supreme Court reversed, holding that an accused's fourth amendment

rights are violated when a police officer deliberately or recklessly includes a material false statement in a warrant application and, setting aside the false statements, the affidavit's remaining content is insufficient to establish probable cause. Id. at 155-56, 171-72, 98 S. Ct. at ___, ___, 57 L. Ed. 2d at 672, 682. In reaching its conclusion, the Supreme Court emphasized the limited scope of its announced rule, id. at 167, 98 S. Ct. at ___, 57 L. Ed. 2d at 679, and carefully excluded from the embrace of the rule statements in the warrant affidavit that resulted from negligence in checking or recording facts relevant to a probable cause determination. The Court stated:

> [t]here is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and

must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Id. at 171-72, 98 S. Ct. at ____,

57 L. Ed. 2d at 682 (emphasis added).[6]

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[6] The court also noted the defendant's concessions "that if what is left is sufficient to sustain probable cause, the inaccuracies are irrelevant, and] if the warrant affiant had no reason to believe the information was false, there was no violation of the Fourth Amendment." Id. at 172, 98 S.Ct. at ____, 57 L.Ed. 2d at 682 n.8.

22. In the undersigned's opinion, the Supreme Court's earlier decision in Rugendorf v. United States, 376 U.S. 532, 84 S. Ct. 825, 11 L. Ed. 2d 887 (1964), which was discussed and distinguished in Franks, 438 U.S. at 159-60, 163-64, 98 S. Ct. at ___, 57 L. Ed. 2d at 674-75, 676-77, underscores the limited scope of the Franks rule. In Rugendorf, a challenge was made, via a motion to suppress, to the legal sufficiency of a search warrant affidavit. The affidavit was executed by a law enforcement official, but contained information not within that official's personal knowledge. Facially, the search warrant was valid and the allegations of the underlying affidavit established probable cause. The defendant, however, contended that certain of the allegations contained in the affidavit were false,

vitiating the affidavit's value in establishing probable cause. Rugendorf, 376 U.S. at 530-33, 84 S. Ct. at 828-29, 11 L. Ed. 2d at ___. After hearing testimonial evidence, the federal trial court denied defendant's motion. Id. The Seventh Circuit Court of Appeals affirmed. Id. at 529, 84 S. Ct. at 826, 11 L. Ed. 2d at ___.

23. Assuming, for purposes of its decision, that the defendant could attack the veracity of the warrant affidavit, the Supreme Court, on certiorari, rejected defendant's specific challenge, stating that

> [t]he factual inaccuracies depended upon by [the defendant] to destroy probable cause . . . were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of this affiant, did not go to the integrity of the affidavit. . . . Since the erroneous statements [identified] were not those of

the affiant, they fail to show that the affiant was in bad faith or that he made any misrepresentations to the [judicial officer] in securing the warrant.

Id. at 532-33, 84 S. Ct. at 828-29, 11 L. Ed. 2d at ___.

24. In discussing Rugendorf, the Franks Court emphasized as highly relevant the distinction between circumstances in which the affiant reports facts not within her personal knowledge and those in which the affiant professes to report facts personally known to her. In that regard, the Franks Court made the following observation:

We should note . . . why this case cannot be treated as was the situation in [Rugendorf]. . . . Here, whatever the judgment may be as to the relevancy of the alleged misstatements, the integrity of the affidavit was directly placed in issue by [the defendant] in his allegation that the affiants did not, as claimed, speak directly to Lucas and Morrison, [individuals whom the affiants claimed had provided them with certain damaging information about the defendant].

> Whether such conversations took place is surely a matter "within the personal knowledge of the affiant[s]."
>
> Franks, 438 U.S. at 163-64, 98 S. Ct. at ___, 57 L. Ed. 2d at 677.

25. Applying the Franks rule, as other courts have done, see, e.g., Willocks v. Dodenhoff, 110 F.R.D. 652 (D. Conn. 1986), and the Rugendorf rule, as this court believes it must, to the context of a section 1983 "affiant liability" action, the resulting burden of proof on the plaintiff is substantial. A plaintiff, at least, must prove that the affiant knowingly and intentionally, or with reckless disregard, included material false statements in a warrant affidavit, which false statements were necessary to a judicial officer's subsequent finding of probable cause. Where the affiant merely attests to information not within her personal knowledge, the plaintiff

additionally must prove that the affiant knew or had reason to know that the information was false.[7]

26. Although the defendants herein suggest that they can meet their Rule 56 burden on summary judgment by submitting, as they have, evidence of an arrest warrant signed by a judicial officer (that is, the "Writ of Body" signed by the Probate Judge), the undersigned believes that more is required. Specifically, defendants must adduce sufficient evidence to establish that Salter, who had no personal

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[7] The court notes that Salter, in executing the verified Petition to Commit, acted much like a law enforcement officer who, acting pursuant to information received from a confidential informant, executes a warrant affidavit that later is used by an appropriate judicial officer as s basis for issuing an arrest warrant.

knowledge of the information contained in the Petition to Commit, neither knew nor had reason to know that the information he included in the Petition was false, and that Salter's lack of knowledge did not result from a deliberate, knowing, or reckless disregard of facts available or reasonably available to him.[8] Only once defendants have done so, will the burden shift to the plaintiff to set forth specific facts showing that there is a genuine issue for trial. See supra

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8 Defendants can satisfy their Clark burden by showing that plaintiff cannot prove at least one of the elements necessary to his claim for relief. Thus, alternatively, the defendants could satisfy their burden on summary judgment by showing that there was probable cause for the issuance of the arrest warrant (the "Writ of Body") in the absence of the alleged falsehoods contained in the affidavit (the Petition to Commit).

pages 14-15 herein for the court's discussion of defendants' burden under Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

27. Defendants herein have met their Clark burden. Specifically, defendants have adduced substantial evidence that Salter acted solely based on information, believed by him to be true, obtained from several other individuals whom he believed to be reliable and credible. That information was garnered from Salter's conversations with Robert Ensley; Sousa, who had consulted directly with Gordon and Rovers; McFadden, who also had consulted directly with Rovers; Gilliard; and others. The information obtained presented a consistent, ominous picture to Salter of Bush's apparent instability. There is nothing in the record herein to

suggest that Salter received any mitigating information about Bush from any source and merely disregarded such information. Moreover, prior to executing the Petition to Commit -- the first Petition he had ever executed --, Salter duly investigated alternatives to trying to commit Bush. Although it is true that he did not personally confront Bush to determine if Bush, perhaps, should or could receive counseling, others, including Gordon and Ensley, had tried to reason with Bush, but did so to no avail. Bush, in fact, conceded in his deposition that he had no information that Salter lied in executing the Petition to Commit, but, instead, stated that Salter perhaps had been given incorrect information. The foregoing evidence satisfies the defendants' Clark burden.

28. Plaintiff has adduced no evidence, other than his own blanket denials and the Commitment hearing transcript, to try to establish that there is a genuine issue of material fact regarding Salter's knowledge (or culpable lack thereof), at the time he executed the Petition to Commit, of the veracity of the statements included in the petition. Plaintiff's denials, and the slight discrepancies between what was alleged in the Petition to Commit and the matters to which the witnesses testified at the Commitment hearing, simply do not create a genuine issue concerning Salter's knowledge prior to and at the time he executed the Petition to Commit. Bush's denials, in fact,

merely contradict the testimony of non-affiants Gordon, Ensley, Stroman, and Rovers, each of whom is not a defendant in this action.[9]

30. There is no evidence of record to suggest that any of the individual defendants other than Salter directly participated in the preparation and filing of the Petition to Commit. Pretermitting

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[9] Although not playing any part in the court's determination, defendant's insistence that all of the allegations contained in the Petition to Commit are completely false is directly and completely contrary all of the information contained in the record herein, including the transcript of the Commitment hearing and the depositions. The court concludes that Bush's mere blanket denial of all of the aforementioned information of record is insufficient to satisfy his burden on summary judgment.

consideration of whether the individual defendants may be held liable in the absence of such evidence, the court concludes that plaintiff's fourth amendment claims must fail as a matter of law against all defendants, including the School Board, given this court's conclusion that no fourth amendment violation resulted directly from Salter's actions.

D. Bush's Remaining State Law Claims

31. The court declines to consider the merits of Bush's remaining, state law claims. Instead, the court concludes that each of those claims is due to be dismissed, there being no remaining independent basis, or compelling justification, for this court's continued exercise of jurisdiction.

E. **Conclusion**

In light of the foregoing discussion, the court concludes that defendants' motion for summary judgment is due to be, and hereby is, **GRANTED** as to Bush's federal fourth amendment claims only. The remainder of Bush's claims, all of which arise under state common law, are due to be, and hereby are, **DISMISSED** for lack of jurisdiction.

Judgment shall be entered by separate order.

DONE this the ___ day of February, 1992.

UNITED STATES DISTRICT JUDGE